

DOE Acquisition and Financial Assistance Implementation Guide for the American Recovery and Reinvestment Act of 2009

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Preamble

The American Recovery and Reinvestment Act (the Recovery Act of Act) of 2009 was enacted to preserve and create jobs and promote economic recovery, assist those most impacted by the recession, provide investments needed to increase economic efficiency by spurring technological advances in science and health, invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits, stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive State and local tax increases.

The Act appropriated over \$38 billion dollars to the Department of Energy (DOE) to fund contracts and financial assistance agreements for energy related research and development and environmental cleanup and to provide innovative energy loan guarantees.

This Guide is being provided to assist DOE acquisition and financial assistance personnel in the implementation of Recovery Act requirements and supplements guidance contained in the Office of Management and Budget's (OMB) February 18, 2009, guide entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009."

This Guide will be periodically updated/supplemented, as necessary, to address additional information, guidance, and requirements that may result from finalization of Federal Acquisition Regulation (FAR) rules, additional OMB or other Government-wide guidance, lessons learned, agency benchmarking, etc.

Chapter 1 – General Information

1.1 What is the purpose of this Guide?

The purpose of this Guide is to provide guidance on funding acquisition and financial assistance activities (awards and modifications/amendments) with American Recovery and Reinvestment Act of 2009 (Recovery Act) appropriations to ensure the effective use and management of those funds. The Guide outlines necessary changes to standard processes for awarding and administering Recovery Act funds to meet accelerated timeframes and other unique challenges posed by the Act's transparency and accountability framework. This Guide supplements the guidance in the Office of Management and Budget document, "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (Attachment 1).

1.2 What is the goal of this Guide?

The goal of this Guide is to ensure DOE contracting, through coordination with program and staff office personnel (e.g., legal counsel, finance/budget) are taking the necessary steps to ensure the following objectives are met:

- Recovery Act funds are obligated and distributed in a prompt, fair, and reasonable manner in compliance with applicable laws, regulations, policies and procedures;
- The entities that receive Recovery Act funding and the manner in which these funds are used are transparent to the public, and the public benefit of these funds are reported clearly, accurately, and in a timely manner;
- Recovery Act funds are used for authorized purposes and instances of fraud, waste, error, and abuse are avoided or mitigated;
- Projects that are funded under the Act avoid unnecessary delays and cost overruns; and
- Program goals are achieved, including specific program outcomes and improved results on broader economic indicators.

1.3 What are the critical requirements or elements of the Recovery Act?

The Recovery Act includes several provisions that require steps beyond standard practice. Many of the critical requirements revolve around special reporting requirements – internal and external, particularly to OMB and to the Recovery.gov website. In addition, there are special timeframes for issuing funding opportunities announcements and for synopsizing acquisition and financial assistance opportunities and awards.

The Recovery Act prescribes a time limit for the obligation of funds – September 30, 2010. Contracting Officers must obligate all Recovery Act funds by that date. Recovery Act funding will have special Treasury Accounting Symbols to aid in their identification. Contracting Officers should coordinate directly with their respective site CFOs for assistance in understanding the unique accounting code and systems requirements. Because the Recovery Act funds are time limited, appropriations law also restricts the time that these funds will be available for payments and/or reimbursement of costs. Contracting Officers and other invoice approving officials may only use Recovery Act funds to pay invoices through September 30, 2015. For

M&O contracts with an integrated accounting system, the Recovery Act funds will not be available for drawdown after September 30, 2015.

Invoices may include requests for payment from projects that are to be reimbursed by both Recovery Act and non-Recovery Act funds, so long as the contractor's/recipient's accounting system segregates the costs and the invoice clearly designates the Recovery Act work.

1.4 Are actions awarded using Recovery Act funding subject to the Headquarters Business Clearance Process?

Yes. The policies and procedures prescribed in DOE Acquisition Guide Chapter 71.1 apply to transactions awarded using Recovery Act funding. In recognition of the objectives of the Recovery Act and the emphasis on expediting acquisition and financial assistance awards under which Recovery Act appropriations will be obligated, the Acquisition Planning and Liaison Division (MA-621) is engaged with and coordinating closely with affected Headquarters Program Office officials and Field Contracting Office Procurement Directors in developing sound, regulatory compliant contracting and financial assistance strategies and decision models to ensure expedited processing of Recovery Act actions; particularly those that may be subject to Headquarters Business Clearance review and approval. Contracting Officers who are working actions to which Recovery Act funding will be obligated should be in close communication with their respective MA-621 Liaison at the earliest practicable stages of strategy development. In addition, Contracting Officers should submit, as early as possible, the Major Procurement/ Assistance Actions Worksheet to MA-621 in order to expedite consideration by MA-621 of actions that will be selected for or waived from Headquarters Business Clearance review and approval.

1.5 What are the key actions that need to be considered regarding administration and oversight of Recovery Act funding?

DOE Heads of Contracting Activities, in conjunction with Field Procurement Directors and Field Chief Financial Officers, shall ensure that:

- Appropriate safeguards are developed and implemented that ensure that financial and business risks are assessed and addressed prior to the initial award of a contract, contract modification, work authorization, or financial assistance instrument.
- Contracting Officer Representatives (CORs) are properly trained to perform COR duties and that there are adequate numbers of CORs to effectively administer the delegated COR responsibilities.
- Contract management plans and oversight activities are revised, as needed, to incorporate the enhanced reporting, transparency, accountability and monitoring requirements applicable to the Department's administration actions. This is to include appropriate processes and practices that provide for the effective management of contractor work scope, costs, and schedule. In addition, contract award fee, performance evaluation management plans, or similar metrics should be revised to effectively assess contractor

performance and results. With respect to fee allocation and earning, fees are to be appropriately established in consideration of the work scope, performance risk, and cost.

- With respect to contractor costs and to the extent determined necessary, processes and procedures should be established to ensure that costs incurred by the contractor using Recovery Act funds are reasonable, allocable and allowable.

Chapter 2 –Reporting

2.1 What reporting is required under Recovery Act?

The Act and OMB require many different types of reporting. Contracting personnel will be directly or indirectly responsible for several aspects of these reporting requirements, including special entries for FedBizOpps, Federal Procurement Data System (FPDS-NG-NG), Grants.gov and PADS/FAADS, special postings of awards to the internet, and ensuring contractor/recipient compliance with the special reporting requirements under Section 1512 of the Act.

Unless specifically prescribed in this Guide, DOE will not require multiple postings of the same document/information in both Government-wide systems and the agency website (e.g., separate postings of Funding Opportunity Announcements in both Grants.gov and at Energy.gov/Recovery). The Office of Procurement and Assistance Management will provide links on the agency website to Government-wide systems to which Recovery Act actions are to be reported, including Grants.gov, FedBizOpps, and Recovery.gov.

More extensive guidance will be provided once all the Recovery Act processing and reporting requirements have been identified and documented.

2.2 Are there special requirements regarding Requisitions?

In order to track and report Recovery Act funding, Recovery Act and non-Recovery Act funding shall not be combined on a single Requisition, even as separate line items. All requisitions with Recovery Act funding must include the word **“Recovery”** as the first word in the Main| Text | Description block of the Requisition

2.3 What are the new requirements for FedBizOpps?

When posting the pre-solicitation or award notice of a contract, Contracting Officers must clearly label that the action is being undertaken pursuant to the Recovery Act. The word **“Recovery”** should be the first word of the title and the description block should begin by identifying the action as including Recovery Act funds. Note: Award notices are required for actions greater than \$500,000 if that action includes Recovery Act funding.

The following are key changes that the users of the Strategic Integrated Procurement Enterprise System (STRIPES) and the Industry Interactive Procurements System (IIPS) (for sites not deployed on STRIPES) need to be aware of:

- (1) When creating new, or editing existing acquisition solicitations or other notices in STRIPES or IIPS, **“Recovery”** must be the first word in the SUBJECT field for all procurement actions related to the Recovery Act.
- (2) The electronic interface to FBO.gov will recognize if **“Recovery”** is the first word and the system will automatically flag the notice as a Recovery Act submission.

- (3) The public will have the search capability on FBO.gov to locate those opportunities which have been flagged as Recovery Act actions.

Consult the STRIPES User Guide if you are using other than a “Combined” Synopsis/Solicitation notice for additional information.

2.4 What are the new requirements for Grants.gov?

Contracting Officers and Contract Specialists should follow these instructions:

Use the following steps for all Funding Opportunity Announcements (FOA) on Grants.gov, whether they are created in IIPS or STRIPES:

Use the term “**Recovery Act**” within the Opportunity Title.

Note: FOA’s created in STRIPES must be manually posted in IIPS in order to get to Grants.gov. Please refer to the guidance provided by the STRIPES Financial Assistance Team.

For the Opportunity to be searchable, and listed in the Recovery Act search category at Grants.gov, you must select “Recovery Act” under Category of Funding Activity, when creating the solicitation in IIPS. This must be done in addition to any other category that may be required.

Once the solicitation has been received and posted at Grants.gov, login to Grants.gov and at the top of the screen under Grants Opportunity Properties, change the Opportunity Category to “Other” and add “Recovery Act” in the Category Explanation text box.

2.5 Are there special Catalog of Federal Domestic Assistance Catalog (CFDA) requirements?

Another searchable identifier for Recovery Act opportunities will be the new “Recovery Act” CFDA numbers. DOE is conducting a data call to the program offices and is in the process of submitting any requests for new CFDA program numbers to the OMB Max web site where they must be approved by the General Services Administration (GSA) and then the Office of Management and Budget. (OMB). The Information Management Systems Division will have the new numbers added to the IIPS, PADS, and STRIPES once they have been approved. Grants.gov will add these new CFDA numbers as they are received from GSA.

Please contact Jennifer Beale at Jennifer.beale@hq.doe.gov or at 202-287-1355, with questions concerning the CFDA.

2.6 What are the new requirements for FPDS-NG and PADS?

For the contracting offices not currently using STRIPES, all acquisition awards and modifications involving Recovery Act funds are to be reported to the Federal Procurement Data System-Next Generation (FPDS-NG) within 24 hours of the award.

In addition, for offices not currently using STRIPES, all financial assistance awards and interagency/international agreements and modifications with Recovery Act funds are to be reported to the Procurement and Assistance Data System (PADS) within 24 hours of award.

Note: Funding provided for under the Recovery Act cannot be combined with non-Recovery Act funding on a single award or modification, and, accordingly, must be reported to FPDS-NG or PADS as separate base awards or modifications

Requisitioners have been instructed that combining Recovery Act and non-Recovery Act funding on a single requisition is prohibited (see Section 2.2). The basis is to ensure the appropriate segregation, control, and tracking of Recovery Act funding.

Should a requisition be received that includes both Recovery and non-Recovery Act funding, the Contracting Officer must reject the requisition and require resubmission of separate requisitions that must be processed as two separate funding actions (e.g., basic award and modification; two separate modifications).

Reporting the Treasury Accounting Symbol (TAS)

The Treasury Accounting Symbol (TAS) is required for all reports to FPDS-NG and PADS, regardless of whether STRIPES is used or not. The TAS must be reported for all awards or modifications funded by the Recovery Act. The TAS is not required to be reported for non-Recovery Act actions.

For organizations using STRIPES, the Contracting Officer must coordinate with the site Chief Financial Officer to obtain the appropriate TAS for Recovery Act funding until changes to STRIPES/STARS can be accomplished. In the case of organizations not on STRIPES, coordination with the site Chief Financial Officer will be necessary until the office implements STRIPES.

Include the following language in the Description of Work data field, used for the FPDS-NG and PADS reporting, for all awards and modifications that use funding from the Recovery Act:

For FPDS-NG

“TAS::(actual Treasury Accounting Symbol)::TAS Recovery” followed by the actual Description of Work.

For PADS:

“TAS::(actual Treasury Accounting Symbol)::TAS Recovery” followed by the actual Description of Work.

While FPDS-NG supports reporting multiple TAS codes, it does not have the ability to allocate the funding among these codes; therefore, DOE contracting offices must report only one TAS code per award/ modification to ensure Recovery Act funding is accurately reported.

For additional guidance see OMB Guide, Chapter 2, Section 2.6 (Attachment 1).

2.7 FAADS Reporting and the Nine Digit Zip Code

For financial assistance, the Contracting Officer must report to STRIPES, including the FAADS reporting module, or PADS (PADS if you are not using STRIPES) the full nine digit zip code for the place of performance.

2.8 What are the other responsibilities of the Contracting Officer for complying with the reporting requirements?

Contracting Officers are responsible for ensuring that contracts and grants, whether new or amended, contain the Recovery Act Reporting Requirements provision. They are responsible for informing contractors and recipients of the reporting requirements and for tracking contractor and recipient compliance. Contracting Officers are responsible for ensuring that the basic award and each modification has only has one type of funds (i.e., Recovery Act or non-Recovery Act appropriations). They are also responsible for including the appropriate Special Terms and Conditions (Attachments 3 and 4) that include the Recovery Act Reporting provisions.

DOE acquisition personnel are responsible for ensuring the data integrity and quality (accuracy/completeness) of all award information to be reported, including data pertaining to Recovery Act funding. All actions are expected to be reported to FPDS-NG within 24 hours, if the contracting activity is not using STRIPES, and at the time of award if the contracting activity has implemented STRIPES.

2.9 What reporting will be collected from contractors and recipients of Federal funding for reporting on Recovery.gov?

The Recovery Act requires extensive reporting from the prime recipients of Federal funding. Each recipient that meets the definition above is required to report the following information to the Federal awarding agency 10 days after the end of each calendar quarter, starting on July 10th, 2009.

These reports will include the following data elements, as prescribed by the Recovery Act:

- (1) The total amount of recovery funds received from that agency;

- (2) The amount of recovery funds received that were expended or obligated to projects or activities. This reporting will also include unobligated balances to facilitate reconciliations.
- (3) A detailed list of all projects or activities for which recovery funds were expended or obligated, including--
 - (A) The name of the project or activity;
 - (B) A description of the project or activity;
 - (C) An evaluation of the completion status of the project or activity;
 - (D) An estimate of the number of jobs created and the number of jobs retained by the project or activity; and
 - (E) For infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds made available under this Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.
- (4) Detailed information on any subcontracts or subgrants awarded by the recipient to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (P.L. 109-282), allowing aggregate reporting on awards below \$25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

Contracting Officers are responsible for including this requirement in contracts, grants, cooperative agreements and TIAs. Pending the issuance of final rules and guidance from OMB, the attached lists of clauses and special terms and conditions contain interim language for use in awards instruments. These clauses will be incorporated into the Corporate Clauses template in STRIPES. Contracting Officers are also responsible for ensuring receipt of the quarterly report and submission of the report to a central location yet to be identified.

2.10 Will these reports be made available to the public?

All reporting will be used to populate Recovery.gov. Agency-wide and program-specific plans will be posted on the agency website on a dedicated page for Recovery Act activities. Acquisition, financial assistance and program officials should remember that accountability and transparency of information are of utmost importance.

Chapter 3 – Grants

3.1 What actions, beyond standard practice, should be considered while planning for competitive awards under Recovery Act?

(1) Evaluation Criteria for Award

Contracting Officers should include either a merit review criterion or a program policy factor that allows for evaluation of projects that support the goals of the Recovery Act.

Merit Review Criterion should be tailored to the Funding Opportunity Announcement (FOA) and address how the application will show merit vis-à-vis the type of activity being proposed and the goals of the Recovery Act.

Program policy factors should be included that indicate a preference for projects that are fast starts and for those with the greatest likelihood of achieving jobs creation and preservation and/or other factors that can measure the projects success of promoting the goals of the Recovery Act. Sample factors are listed below.

It is desirable to select those projects that have the greatest likelihood of creating or preserving jobs in support of the Recovery Act.

It is desirable to select projects that can be started quickly, preferably with expenditures beginning before June 17, 2009.

or

Selection Preference for Applications that promote and enhance the objectives of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, especially job creation, and/or preservation and economic recovery in an expeditious manner.

(2) Competition

It is DOE's preference that awards made in support of the Recovery Act be made based on merit and competition. In those instances with sufficient justification to support award on a non-competitive basis, Contracting Officers must ensure that a Determination on Non-competitive Financial Assistance (DNFA) has been approved in accordance with 10 CFR 600.6.

(3) Existing Grants, Cooperative Agreements and TIAs

To ensure required and appropriate segregation and tracking of Recovery Act funding, the preferred method of obligating Recovery Act funding for projects or activities that are covered under existing financial assistance agreements is to make a separate new award to which only Recovery Act funding will be obligated in lieu of obligating Recovery Act funding via a modification of the existing award. In addition to ensuring appropriate segregation/tracking of Recovery Act funding, this approach is necessary to ensure a clean

audit trail of Recovery Act funds and to resolve the inability of the Treasury Department's ASAP system to separately cost Recovery Act funding from other appropriations that are obligated to an existing agreement when the ASAP system is used as the payment method. The new award should make reference to the original award and clearly identify those portions of the project(s) or activit(ies) that is/are being funded by Recovery Act funds for completion and payment under the new award.

Recovery Act funds may be obligated to existing award in those instances where:

- (1) all non-Recovery Act funds have been expended, reimbursed and costed. For these awards, non-Recovery Act funds may not be obligated to the award until all Recovery Act funds have been expended and reimbursed; or
- (2) the activity cannot be broken into two parts. In this instance, payment by ASAP is no longer an option. The agreement should be amended to reflect that payments will be made by the Automated Clearing House System.

Recovery Act funds must be tracked and accounted for separately from all other sources of funding for audit and reporting purposes. Contracting Officers must determine if the recipient's financial, accounting, and administrative reporting systems are capable of segregating, tracking, and reporting Recovery Act funding from other appropriations.

(4) Timeliness of Awards

The Recovery Act is intended to create and retain jobs and assist in the recovery of the U.S. economy. Accordingly, awards should be made as quickly as possible (the Act says "commencing expenditures and activities as quickly as possible consistent with prudent management") and that the projects or activities under the awards should be able to start expending funds soon after award, preferably within 120 days. Expediting awards may require implementation of streamlined evaluation and award processes. When streamlining processes, the accountability and transparency requirements of the Recovery Act as well as sound business judgment must be emphasized to ensure appropriate obligation of Recovery Act funds in compliance with applicable laws, regulations, and policy requirements.

3.2 Are there terms and conditions, beyond standard practice, that must be included in financial assistance agreements under Recovery Act?

The Contracting Officer must include the American Recovery and Reinvestment Act Special Terms and Conditions – Financial Assistance Attachment 3) into all new and amended awards to which Recovery Act funds will be obligated. These Terms and Conditions will be incorporated into the STRIPES financial assistance templates for your use.

Agreements that have not been amended to change the reporting requirement for financial reporting to require the submission of SF-425 in place of SF-269, SF-269a and SF-272

should include this revision in the amendment to which Recovery Act funds will be obligated.

3.3 Are Contracting Officers expected to comply with existing administrative grants requirements?

The Recovery Act does not provide for deviations or waivers from standard practices and requirements. Contracting Officers must comply with all laws, regulations, policies, procedures and administrative requirements. If a waiver or deviation is considered necessary, it should be justified and approved in accordance with current procedural requirements. Each deviation/waiver request will be considered consistent with current requirements and authorities.

3.4 What audit tools will be used to ensure accountability for Federal awards under Recovery Act?

- Non-Federal entities (States, local governments, and non-profit organizations) are required by the Single Audit Act Amendments of 1996 (Single Audit) and OMB Circular A-133 to have an annual audit of their Federal awards (e.g., grant programs).¹
- Incurred cost audits will be necessary for most Recovery Act awards during the closeout process.
- OIGs will perform audits and inspections of their respective agencies awarding, disbursing, and monitoring of Recovery Act funds to determine whether safeguards exist to ensure the funds are used for their intended purposes.

3.5 What else should Contracting Officers be aware of?

- (1) The advanced level of accountability and transparency require that the pre and post award files (paper or electronic), be current, accurate and complete.
- (2) Risk Management is an important component of financial assistance programs and the award and administration of financial assistance agreements. Contracting Officers should consider risk and make adjustments in actions as necessary.
- (3) All awards should have an assigned Technical Project Officer (TPO).
- (4) Contracting Officers and Source Selection officials should pay particular attention to personal and organizational conflicts of interest of merit reviewers. A personal conflict of interest exists when a reviewer has an interest in an application that is likely to bias his or her evaluation of it. An organizational conflict of interest may exist when the employer of the merit reviewer, i.e. a DOE National Laboratory, has an interest in or

¹ Technical Single Audit exceptions applicable to a very small percentage of funding are entities expending less than \$500,000 a year are exempt from Single Audit and a few non-Federal entities are permitted to have biennial audits under a grandfathering clause.

connection to the application (including, for example, providing key personnel, reliance on an applicant for significant non-Federal funding, potential royalties from use of a technology that is proposed) that could diminish the capacity of the reviewer to evaluate an application in an impartial, technically sound manner, or that may otherwise provide an unfair advantage to the reviewer, the National Laboratory or the applicant.

Merit reviewers from DOE's National Laboratories or other contractors must be screened for both personal and organization conflicts of interest. In no case may a contractor employee be part of a merit review panel where his/her company, university, etc. has submitted an application (including as a team member).

Chapter 4 – Contracts

4.1 Are there actions that must be taken while planning for contract awards under the Recovery Act?

The Recovery Act does not provide for waivers or deviations from the Federal Acquisition Regulation (FAR). Therefore, FAR requirements apply to all contracts, interagency agreements, task and delivery orders and modifications that include funds appropriated under the Recovery Act. Contracting Officers may request waivers or deviations, where otherwise appropriate through normal processes. Please clearly identify how the actions under Recovery Act will benefit from the waiver or deviation. Each request will be considered consistent with current requirements and authorities.

Consistent with the accountability and transparency requirements of the Recovery Act, good acquisition planning is critical. Contracting Officers must engage program officials at the earliest practicable stages of the planning process to assist in requirements definition and acquisition strategy development. Key considerations to consider include: competition, contract type; small business participation; small business subcontracting goals; evaluation criteria; how the work will be tasked, how the work will be monitored, and performance measures and metrics to ensure that the objectives of the Recovery Act are met.

- *Competition:* The Recovery Act includes a preference for competitive awards. Although new competitions are not required by the Act, non-competitive awards, including new work that will be added to existing contracts that are subject to the requirements of FAR Part 6 are subject to special reporting requirements of the Act (see Chapter 2). For modifications to existing contracts that were competitively awarded under which Recovery Act funding will be obligated, incremental funding or funding resulting from authorized changes within the existing scope of the contract are not considered non-competitive actions and are therefore not subject to the special reporting requirements of the Act. However, modifications to existing contracts that were awarded non-competitively as well as modifications that will result in new work being added to the contract thus requiring a sole-source justification in accordance with FAR Part 6 are considered to be non-competitive actions and are subject to the special reporting requirements of the Act. This is so whether or not the basic award was competitive.
- *Contract Type:* Funds may be obligated on any new or existing award vehicle, including a Government-wide Acquisition Contract (GWAC), multi-agency contract, General Services Administration (GSA) Federal Supply Schedule contract, or agency indefinite-delivery/indefinite-quantity contract.
- *Small Business Participation and Small Business Subcontracting Goals:* The requirements of the Small Business Act, as implemented in FAR Part 19, apply to all awards to which Recovery Act funding will be obligated. Accordingly, emphasis should be made on ensuring small business participation in acquisition strategy development. Additionally, when amending current awards with subcontract plans, Contracting

Officers should assess and, as appropriate, renegotiate current goaling requirements to include the projects/activities that will be funded using Recovery Act appropriations.

- *Evaluation Criteria:* For all new awards and modifications for projects or activities that will be funded using Recovery Act appropriations, Contracting Officers should evaluate the offeror's/contractor's proposal to assess the offeror's/contractor's ability to accomplish the objectives of the Recovery Act, including job creation and/or preservation and economic recovery in an expeditious manner.
- *Tasking Work:* Contracting Officers must segregate work using Recovery Act funds by awarding a new contract or new task order under an existing indefinite delivery/indefinite quantity contract, including a General Services Administrations Multiple Award Schedules contract. For modifications to existing contracts, Contracting Officers should issue separate task assignments, work authorizations, or contract line-items to segregate work performed that will be funding using Recovery Act funding. Each new tasking must clearly state that the work is to be performed using Recovery Act funding and that the contractor needs to segregate tracking and reporting of funds for the work in accordance with the Special Terms and Conditions – Acquisition (Attachment 4).
- *Monitoring Work:* Contracts and Orders that include Recovery Act funds require special oversight and monitoring. Contract administration activities will require a higher degree of diligence and oversight. Contracting Officers and Contracting Officer Representatives need to be aware of the special requirements of the Recovery Act, particularly the segregation and accounting of costs and special reporting requirements. Contracting Officers should coordinate closely with their respective Chief Financial Officer and engage audit support as required to ensure that appropriate systems are in place or established to meet these requirements. More frequent and more formal communication among acquisition, program, financial, legal, and audit staff may be required to ensure the funds are obligated, expended and reported properly. Accordingly, these requirements should be addressed in new or amended Contract Management Plans (ref: DOE Acquisition Guide 42.5).
- *Performance Measures and Metrics:* All new or modified awards must specify performance outcomes and measures that will be used to assess performance of Recovery Act work. While these performance outcomes and measures may subsequently be incorporated into fee incentives, through an Award Fee Plan, Performance Evaluation Management Plan, or other similar document, the contract work scope (e.g., Section C or contract attachment) must tie the Recovery Act work to these outcomes and measures.

4.2 Are there actions, beyond standard practice Contracting Officers must take related to solicitation of offers and award of contracts under Recovery Act?

Yes. While the FAR generally provides the necessary policies and procedures for soliciting offers and awarding contracts, the Recovery Act imposes unique transparency requirements that change the pre-solicitation and award notice process, beyond standard practice, as follows:

(1) Unique Requirements for Posting of Presolicitation Notices

Contracting Officer must post presolicitation notices on FedBizOpps (FBO) in accordance with FAR Part 5 for orders placed against task and delivery order contracts, including Government-wide Acquisition Contracts (GWACs), multi-agency contracts, and GSA Multiple Award Schedule contracts. These notices will be posted in FBO for information purposes only. The time requirements of FAR 5.203 do not apply. To facilitate transparency and ensure consistency in tracking notices for Recovery Act funds, the notice must use the following special formatting requirements:

- All presolicitation notices must include the word “Recovery” as the first word in the *Title* field in FBO preceding the actual title.
- Presolicitation notices for delivery and task orders must also include the following statement in the *Description* field preceding the actual description:

“THIS NOTICE IS PROVIDED FOR INFORMATION PURPOSES ONLY.
THIS OPPORTUNITY IS AVAILABLE ONLY TO CONTRACTORS UNDER
[contracting officer insert program name. For example: GSA Schedule 03FAC,
COMMITTS, Navy’s SEAPORT-E.]

(2) Unique Requirements for Announcing Contract Awards

Contract award notices must also be posted at FBO in accordance with FAR Part 5, including all task and delivery orders as described in (1) above. To facilitate transparency and ensure consistency in tracking award announcements for Recovery Act funds, the following special formatting requirement must be used:

- All award announcements must include the word “Recovery” as the first word in the *Title* field in FBO preceding the remaining title.

(3) Segregation of Costs

As emphasized in Section 4.1, the Recovery Act requires a high degree of accountability and transparency on the use of the funds. Contractors must be able to segregate and track Recovery Act funds from other appropriations and non-federal revenue streams. Contracting, program, financial management and auditing staff will need to be able to identify costs associated with work funded by the Recovery Act.

(4) Responsibility Determinations

As with all acquisitions, Contracting Officers shall ensure that recipients of Recovery Act funds are responsible in accordance with the requirements of FAR Part 9. FAR Subpart 9.103 states that a prospective contractor must affirmatively demonstrate its responsibility,

including, when necessary, the responsibility of its proposed subcontractors. The general standards for responsibility include that the prospective contractor have:

- Adequate financial resources to perform the contract or the ability to obtain them;
- A satisfactory record of past performance, integrity, and business ethics;
- The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; and
- The necessary production, construction, and technical equipment and facilities, or the ability to obtain them.

Additionally, the prospective contractor must be otherwise qualified and eligible to receive an award under applicable laws and regulations. The Excluded Parties List System must be checked before determining a prospective contractor responsible.

4.3 Are there actions, beyond standard practice, that agencies must take related to the administration and monitoring of contracts under Recovery Act?

Additional oversight may be appropriate for work funded under the Recovery Act. In particular the tracking and auditing of the funds may require additional documentation and review. Contracts should be actively monitored to ensure that performance, cost, and schedule goals are being met, including:

- Amending, as appropriate, applicable incentive and award fee plans to tie-in the use of Recovery Act funds;
- Ensuring that incentive and/or award fees are effectively administered. (For further guidance, see the OFPP memorandum entitled *Appropriate Use of Incentive Contracts*, 12/4/07);
- Requiring amended subcontracting plans, if appropriate, and stress the preference for small business subcontracting on projects funded by the Recovery Act;
- Reviewing and updating contract management plans as appropriate to address Recover Act administration requirements;
- Implementing new or revised quality assurance procedures;
- Documenting timely inspection and acceptance of deliverables;
- Promptly using all available tools to identify and remedy deficiencies related to contractor performance, cost, and schedule (e.g., Quality Assurance Surveillance Plans, cure notices, show cause letters); and
- Completing timely contractor performance evaluations that accurately reflect the contractor's actual performance, supported by appropriate documentation.
- For modifications to existing contracts, analyzing the impact on current indirect rates (e.g. provision billing rates), adjusting contract estimated costs and revising rates as appropriate.

4.4 Are there terms and conditions, beyond standard practice, that must be included in contract agreements under Recovery Act?

Contracting Officers must incorporate the Special Terms and Conditions – Acquisition (Attachment 4) into all new and amended contracts and task orders to ensure contractor compliance with the requirements of the Recovery Act. Contracting Officers must incorporate the new FAR Recovery Act clauses when they are effective.

4.5 Are there actions, beyond standard practices, that agencies must take related to oversight and audit of contracts awarded under Recovery Act?

Additional audits may be required for contracts using Recovery Act funds. Incurred cost audits should be performed during the closeout process. There will also be additional oversight from outside of DOE. The Recovery Accountability and Transparency Board, established by the Act, Congress and the Office of Management and Budget will oversee and monitor implementation of the Recovery Act through periodic reporting on the use and expenditure of funds.

4.6 Can Recovery Act funds be used in conjunction with Interagency Agreements?

Interagency Agreements may be used to transfer the funds to another agency. Interagency Agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of Recovery Act. These include, but are not limited to, report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov. Planning is essential to ensure work performed under the Interagency Agreement supports the goals of the Recovery Act. If there will not be job creation or retention, a different method of obtaining the services should be considered.

DOE may accept funds in Interagency Agreements, including those under the Work for Others program, with Recovery Act dollars if the above items are addressed. However, special consideration should be given as to whether or not the acceptance of work funded by the Recovery Act meets the goals of the Act. If new personnel will not be hired, it is not appropriate to accept funds from another agency.

4.7 What are the special Buy American requirements?

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council will issue an interim rule (FAR Case 2009-008) amending the FAR to implement the Recovery Act with respect to the Buy American provision, section 1605. Section 1605 prohibits the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances: (1) iron, steel, or relevant

manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; (2) inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or (3) applying the domestic preference would be inconsistent with the public interest.

The FAR rule, when effective, will provide more detailed guidance. Until then, Contracting Officers should use the new clauses contained in Section J of the Special Terms and Conditions – Acquisition (Attachment 4). DOE Acquisition Letter (AL) 2008-06, Domestic and Foreign Procurement Preference Requirements, dated February 19, 2008, included deviations to several FAR clauses relating to the Buy American Act. Pursuant to the Office of Procurement and Assistance Management’s coordination with the U.S. Trade Representative’s office, no DOE deviations are required for the new clauses relating to the Recovery Act. The Special Terms and Conditions -- Acquisitions (Attachment 4) has been appropriately updated. After the FAR rule is issued, the AL will be revised and updated. Additionally, further guidance will be issued relating to the Buy American Act provisions of the Recovery Act as it applies to DOE’s Management and Operating contracts.

4.7 What other guidance is there?

- **Attachment 1** of this Guide is a copy of OMB’s Initial Implementing Guidance for American Recovery and Reinvestment Act of 2009.
- **Attachment 5** of this Guide provides more detailed procedural guidance for Contracting Officers to consider when obligating Recovery funding to existing contracts, including special considerations for Management and Operating (M&O) contracts.
- **Attachment 6** of this Guide provides a model contract modification for incorporating Recovery Act requirements developed by the Office of Environmental Management. This model is not mandatory and should be used, in whole or in part, as may be appropriate for a particular modification.

Chapter 5 – Management and Operating (M&O) Contracts

5.1 How does the Recovery Act affect M&Os?

All Recovery Act requirements apply to M&O contracts. In addition to the guidance contained in Chapter 4 of this Guide, Contracting Officers, in coordination with program officials and site Chief Financial Officers, must consider the following when using Recovery Act funds under an M&O.

- Ensure that the contractor's accounting and financial management systems allow for segregating the Recovery Act funds.
- Ensure that the contractor reviews and updates its Management Control systems pursuant to DEAR 970.0370.
- Ensure that the contractor's integrated accounting system can adequately segregate and report on Recovery Act dollars (i.e., the costs of Recovery Act work can be separately extracted from the system).
- Issue separate work authorizations for each project funded with Recovery Act dollars.
- Assess the need for new or revised subcontracts that may be required to complete the projects funded by the Recovery Act (e.g., consent requirements, amendments to current subcontracting plans).
- Ensure that the Interagency Agreement executed for work performed to be performed in support of other agency requirements under DOE's Work for Others program clearly specify DOE and contractor requirements for use with the other agencies' Recovery Act funds.

5.2 Frequently Asked Questions

To date the Department has received a number of questions from DOE acquisition personnel and from industry regarding the impact of certain provisions of the Recovery Act. The following address inquiries received to date to assist Contracting Officers implement and administer contracts under which Recovery Act requirements will apply.

(1) What are the flow down requirements of the Recovery Act?

The Special Terms and Conditions – Acquisition (Attachment 4) prescribes interim terms and conditions pending the issuance of final Government-wide guidance. In general, the interim terms and conditions should be included in only first tier subcontracts. Some items such as Buy American, Access to Records and Davis Bacon will apply to any level subcontract. The various

provisions contained in the Special Terms and Conditions – Acquisition and any DOE supplementing clauses, will be finalized upon issues of final rulemakings in the FAR.

(2) Are inter-contractor purchases/transfers considered subcontracting for the purposes of the special reporting requirements under Section 1512 of the Recovery Act?

The reporting requirements should be on the first-tier M&O subcontractors.

(3) For subcontracts previously bid or awarded will any grandfathering apply?

Previously award subcontracts that will receive Recovery Act funds must be modified to include the new terms and conditions.

(4) Please provide more information on the Section 1512 reporting requirement.

Additional information will be forthcoming following issuance of final rulemaking in the FAR to implement this requirement.

(5) How many times will my contract be modified to change the Special H clause?

DOE has developed interim clauses for use in awards/modifications which obligate Recovery Act funds pending the issuance of final coverage in the FAR. It is anticipated that awards/modifications will have to be further amended upon issuance of the final FAR rules.

6) Under “definitions”, please give the precise meaning of “Covered funds must be reimbursed by September 30, 2015”.

Because the appropriations have an expiration date of September 30, 2010, all Recovery Act funds obligated to a contract, order or financial assistance agreement must be expended and reimbursed by September 30, 2015, including those funds on contracts with integrated accounting systems.

(7) Under Section B, it states that “Invoices must indicate the portion of the requested payment that is for work funded by the Recovery Act”. This implies that invoices can include both Recovery Act and non-Recovery Act payments on the same invoice. Is that correct?

Yes. Requests for reimbursement should be segregated for work that is tasked/authorized for Recovery Act purposes and work that is not.

(8) Do contracts that use an integrated accounting system need to submit invoices to be reimbursed for Recovery Act funded projects.

No, but the integrated accounting system must be able to report on Recovery Act funds.

(9) The interpretation of the reporting requirements listed in Section H below is that all three conditions must be met to trigger the reporting requirement. Is this a correct interpretation?

Yes. This paragraph implements Sec. 6202 (HR 2642) enacted in the Supplemental Appropriations Act, 2008 (Public Law 110-252).

(10) Why is there a need to reiterate the Audit Access provisions and Davis Bacon implementation?

The Recovery Act requires changes to the FAR access provisions of the IG and GAO. Special audits and reviews of Recovery Act funds will be conducted. The Davis Bacon provision is simply a reminder if the requirements are already applicable to the contract.